No. 14794

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

STAR-KIST FOODS, INC. (formerly The French Sardine Company of California),

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

MACKAY, MCGREGOR, REYNOLDS & BENNION,
A. CALDER MACKAY,
ARTHUR MCGREGOR,
ADAM Y. BENNION,
STAFFORD R. GRADY,
523 West Sixth Street,
Los Angeles 14, California,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Miscellaneous

Rules and Regulations

STATUTES

No. 14794

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

United States of America,

Appellant,

vs.

Star-Kist Foods, Inc. (formerly The French Sardine Company of California),

Appellee.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

BRIEF FOR THE APPELLEE.

Opinion Below.

The opinion of the District Court is not officially reported. However, the District Court's oral opinion from the Bench at the conclusion of trial is at pages 187-197 of the printed Record, and its findings of fact and conclusions of law are therein at pages 36-49.

Jurisdiction.

Appellee adopts the statement of jurisdiction contained in the Brief for the Appellant.

Question Presented.

Whether the District Court was "clearly erroneous" when it found and held that, upon the facts of this case, Appellee should be allowed a deduction, for federal tax purposes as an ordinary and necessary business expense, for an amount (single damages) it paid the Treasurer of the United States in settlement of an alleged OPA price violation, such violation being made under circumstances inconsistent with an intent to violate the law and inconsistent with a lack of due care to conform to the law.

Statutes and Regulations Involved.

The pertinent statutes and regulations involved are set forth in the Appendix, *infra.*

Statement.

The pertinent facts, as found by the District Court, and which Appellee contends are abundantly supported by uncontradicted evidence, may be summarized as follows:

Appellee was incorporated under the laws of the State of California in November, 1917, as The French Sardine Company of California. [R. 24, 36.] In April, 1953, its name was changed to Star-Kist Foods, Inc. [R. 36.] Since its incorporation Appellee has been engaged in the fish cannery business, its principal products being canned sardines, mackerel and tuna. [R. 36.] Appellee purchases raw fish by the ton from fishermen, cans the fish and sells it to customers (who then resell it to consumers) through brokers. [R. 37.]

Appellee's principal place of business is at Terminal Island, Los Angeles, California. [R. 24, 37.] It keeps

its books and files its tax returns on the basis of the accrual method of accounting and on the basis of fiscal years ending May 31. [R. 24, 37.]

Appellee paid the Treasurer of the United States the amount of $97,215.00 on May 20, 1943, as the exact amount of certain alleged overcharges on the sale of its canned tuna, *i.e.,* single damages in settlement of claims made against Appellee by the Office of Price Administration. [R. 37-38.] Appellee deducted said amount on its federal tax returns for the fiscal year ended May 31, 1943, and the Commissioner of Internal Revenue denied the deduction claiming that said amount does not constitute a deductible ordinary and necessary business expense. [R. 38.] Appellee filed timely and valid federal corporation returns for the fiscal year ending May 31, 1943; subsequently paid an additional assessment, filed a timely and valid claim for refund of taxes alleged to have been overpaid; and, in the manner and within the time provided by law, filed the instant action for refund of taxes and interest in the United States District Court. [R. 25-26, 37-38.]

The payment of $97,215.00 grew out of the following circumstances: The Emergency Price Control Act of 1942 was approved on January 30, 1942, and pursuant thereto, the Administrator of the Office of Price Administration (frequently hereinafter referred to as OPA) issued the General Maximum Price Regulation (frequently hereinafter referred to as GMPR).* This regulation

---

Ex. No. 16. Pursuant to Stipulation of Counsel certain exhibits have been excluded from the printed record, but " * * may be referred to in the briefs and arguments of either party hereto the same as if said documents had been included in the printed record." [R. 244-245.]

fixed the price at which the Appellee could sell its products at the same price at which it had sold them during the month of March, 1942. [R. 39.]

Appellee had not sold fancy light meat tuna during March, 1942, and it was, therefore, required, under the terms of GMPR, to adopt as its ceiling price for that commodity, the price which was charged during March, 1942, by its nearest competitor. [R. 39.] There was some dispute and confusion among Appellee's officials as to who was its nearest competitor. [R. 39, 111, 114.] A. T. Williams, Appellee's sales manager, chose Van Camp Sea Food Company, out of an abundance of caution; because Van Camp had the lowest price in the industry, *i.e.,* $11.00 per case on fancy light meat tuna, basis 48/½'s. [R. 39, 111.] Appellee's legal counsel, John Morris, Esq., was consulted about the choice of Van Camp as Appellee's nearest competitor, and he advised that other canners were more closely comparable with Appellee than was Van Camp, and that the ceilings of these other canners, which ceilings were higher than Van Camp's, should be taken as Appellee's ceilings. [R. 39, 111, 114.] Notwithstanding this advice, Appellee, accepted the lowest ceiling price in the industry as its own. Other canners had ceiling prices on this same product several dollars higher. [R. 40, 92, see "Statement of Considerations," p. 7 of Ex. 24, MPR 299.] For instance, High Seas Tuna Company, of San Diego, which was controlled by the same individual (Martin J. Bogdanovich) who (as its president) controlled Appellee, had a ceiling price of $14.00 per case on fancy light meat tuna, basis 48/½'s. [R. 40, 91.]

No ceilings were fixed upon the price of raw fish by GMPR. [R. 40, Ex. 16.] As a result, prices which

canners had to pay for their raw material—fresh fish—rose rapidly. [R. 40.] This was true in many kinds of fish, including tuna. For instance, by the end of 1941, yellowfin (tuna) was bringing $130.00 per ton. Early in 1942, the price jumped to $160.00 and by the end of the season the price had advanced to $190.00. Including bonuses paid fishermen, the 1942 year ended with an average price of $200.00 per ton. This situation was recognized and reflected in the Statement of Considerations issued by the Administrator of OPA when the price of fresh tuna was finally fixed by Regulation No. 366 issued on April 13, 1943. [R. 40; p. 4 of Ex. 25.]

Appellee was caught in an economic bind. It was required to sell its canned fancy light meat tuna for $11.00 per case, the lowest price in the industry; but it was simultaneously required to pay rapidly rising prices in order to procure raw fish. [R. 40.]

This situation, *i.e.,* the widely varying ceiling prices which various canners had upon the same product under GMPR, together with the fact that the price of raw fish was not fixed, and constantly rising, was recognized in the summer of 1942 as an inequitable one by the officials of the OPA, including Charles W. Triggs, who was then the head of the Fish Section of the Office of Price Administration in Washington. Triggs proposed to remedy this situation by issuing a regulation fixing, at a definite dollar and cents figure, the price at which all canners would be required to sell the same product, and also by fixing the price which fisherman could charge for the raw fish. [R. 41, 165-167.]

For the purpose of obtaining some relief from this inequitable situation, Appellee's sales manager, Williams, was in constant touch with OPA officials in Washington

during the Summer and Fall of 1942. He made several trips to Washington to confer with Triggs concerning the matter; he spoke with Triggs frequently over the long distance telephone; and he wrote Triggs. Triggs was of the firm belief that Appellee was in a bad position and advised Williams that a new regulation, which would give Appellee relief, could be expected momentarily; and gave Williams reason to believe that the expected new dollar and cents ceiling price for fancy light meat tuna would be $12.00 per case, basis 48/½'s. [R. 41.]

New dollar and cents ceiling prices were fixed on several canned fish products during the late Summer and Fall of 1942, by issuance of the following regulations:

Regulation No.	Date	Product
184	July 23, 1942	Maine Sardines
209	Aug. 31, 1942	California Sardines
247	Oct. 24, 1942	Domestic Canned Crab Meat
252	Oct. 30, 1942	Vinegar Cured Herring
265	Nov. 9, 1942	Salmon
277	Nov. 28, 1942	Mackerel

The ceiling prices fixed by these regulations were higher than the lowest ceilings under GMPR. For instance, Regulation No. 209, effective August 31, 1942, fixed the prices at which Appellee was entitled to sell its sardines at figures which averaged 20.9% higher than the ceiling price which Appellee had had under GMPR. [R. 42, 144.]

While awaiting the new anticipated dollar and cents ceiling on canned tuna, Appellee accumulated a rather large inventory with a value of over a half million dollars. [R. 42.] During the last week in August and the first three weeks of September, 1942, Appellee shipped about 40 carloads of canned tuna without invoicing it. [R. 42.] Toward the end of September, Appellee's cash

position became relatively low. Whereas Appellee's cash expenditures averaged approximately $235,000.00 per week during the sardine season months of October through December, 1942, Appellee had on hand cash in the amount of $144,919.07 as of September 24, 1942; *i.e.,* less than a week's supply to pay plant payroll, trade accounts, fishermen accounts and other cash requirements. [R. 42; Ex. 33.]

Faced with this situation, Williams consulted Triggs and was advised that the expected dollar and cents ceiling on tuna would be issued shortly; that inasmuch as OPA was allowing increased prices on other canned fish, Appellee would not be taking any chances by raising its price; that he (Triggs) would support anything Appellee might do within reason. [R. 42, 158-159.] Appellee's legal counsel, John Morris, was consulted concerning what steps Appellee might take. He advised that tuna might be both canned and sold through the High Seas Tuna Packing Company in San Diego at a $14.00 per case ceiling, since both Appellee and High Seas were controlled by the same individual, Martin J. Bogdanovich. However, Mr. Bogdanovich decided against this course, because he did not want to profiteer because of the war. [R. 43, 114-116.] Morris also considered the following matters: The admittedly inequitable situation in which Appellee found itself with the lowest ceiling in the industry under GMPR; the possibility that Appellee's ceiling was really not $11.00 a case on fancy light meat tuna because of his opinion that Van Camp was not Appellee's nearest competitor; the pronouncements from governmental officials in Washington, and particularly one by Secretary Wickard that inequities under GMPR would be corrected as rapidly as possible, but that nothing in it should retard production; and the assurances from Triggs;

and, based upon these considerations and others, Morris advised Appellee that in his opinion it would be proper to invoice Appellee's customers, at $12.00 per case of fancy light meat tuna, basis 48/½'s, and place the following notation upon the invoice:

> "Please remit in accordance with this invoice. If OPA fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31, we agree to revert back to our March ceilings, which are $1.00 per case less on 48/½'s and $2.00 per case less on 48/1's, and will refund you accordingly." [R. 43-44, 120-121; Ex. 32, R. 233.]

In accordance with this advice Appellee, on and after September 24, 1942, invoiced its customers with the notation indicated above. Appellee also sent a mimeographed announcement to all of its customers on September 24, 1942, explaining its action. [R. 44; Ex. 35, R. 234-242.] On the same day Appellee by letter advised Triggs of the action taken. [R. 44; Ex. 5, R. 205.]

Due to delays in the Washington office of OPA, the expected regulation fixing a dollar and cents price on canned tuna was not issued until January 7, 1943. [R. 44.] On that date, by Regulation No. 299, the OPA fixed the ceiling price on fancy light meat tuna at $12.00 per case, basis 48/½'s, *i.e.,* at exactly the price at which Appellee had invoiced its customers. [R. 44; Ex. 24.]

Thereafter, the local (Los Angeles) enforcement office of the OPA conducted an investigation of Appellee's sales of canned tuna during the period from September 24, 1942, until the new regulation was issued in January, 1943, and determined that Appellee had overcharged its customers $97,215.00 on sales of canned tuna. Con-

ferences were had between officials of Appellee and enforcement officials of the Los Angeles office of the OPA. Appellee's representatives were told that they had violated GMPR, although they did not violate the intent or purpose of the Act; that in view of the extenuating circumstances, the OPA would consider the matter closed if Appellee would present them (the OPA enforcement officials) with a check in favor of the Treasurer of the United States for the exact amount of the overcharge, as a contribution to the war effort. Appellee thereupon made the payment, dated May 20, 1943, in the amount of $97,215.00 to the Treasurer of the United States. Appellee's officers also signed a waiver of answer and consent judgment in an action to restrain future violations, which action was thereafter, on June 3, 1943, filed by the OPA, in the United States District Court against Appellee. [R. 45; Exs. 26, 27, 28, R. 227-232.]

The action of the Los Angeles enforcement officials of OPA in accepting single damages, instead of suing Appellee for treble damages, was approved in the Washington office of OPA by Herman A. Greenberg, who was then Chief of Enforcement of the Meat and Dairy Products Section of the Food Enforcement Branch of OPA, after investigation, including a review of the correspondence between Appellee and Triggs, and a conference with Triggs in Washington. Single damages were accepted because it was considered that Appellee's violation was inadvertent and not willful; that Appellee had acted in good faith and had taken reasonable precautions to comply with the law. [R. 45-46, 77-78.]

The payment by Appellee to the Treasurer of the United States in the amount of $97,215.00 on May 20, 1943, was made in circumstances which are inconsistent

with an intention to violate the Emergency Price Control Act of 1942 and the Regulations issued thereunder, and inconsistent with a lack of due care to conform to the law and regulations; Appellee acted in good faith and took reasonable precautions to avoid violating the law and regulations; the payment was a method of preventing unjust enrichment by Appellee as a result of the overcharge, and it did not constitute a penalty; and allowance of said payment as a deduction would not frustrate enforcement of the applicable law or regulations and would not violate public policy. [R. 46.] Appellee is entitled to deduct the amount of $97,215.00 as an ordinary and necessary business expense for the fiscal year ended May 31, 1943. [R. 46.]

Summary of Argument.

An amount paid the United States in settlement of a claim by the OPA on account of alleged overcharges is deductible as an ordinary and necessary business expense provided the alleged violation is made under circumstances which are inconsistent with an intent to violate the law and inconsistent with a lack of due care to conform to the law; allowance of a deduction in such circumstances will not frustrate the purposes of the Emergency Price Control Act of 1942.

The District Court's findings and conclusions that the alleged violation in the instant case was made under such circumstances is abundantly supported by substantial uncontradicted evidence, and they are not clearly erroneous. The OPA Administrator's acceptance of single damages, *i.e.,* merely the amount of the overcharge, is positive and compelling evidence that to allow the deduction will not frustrate the policies of the Act.

ARGUMENT.

I.

An Amount Paid to the United States in Settlement of a Claim by the OPA on Account of Alleged Overcharges Is Deductible as an Ordinary and Necessary Business Expense Provided the Alleged Violation Is Made Under Circumstances Which Are Inconsistent With an Intent to Violate the Law and Inconsistent With a Lack of Due Care to Conform to the Law.

Section 23(a)(1)(A) of the Internal Revenue Code of 1939 (as amended by the Revenue Act of 1942, c. 619, 56 Stat. 798), which is the provision applicable to the fiscal year of Appellee ended May 31, 1943, provides in part that:

> "SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions:
>
> (a) Expenses.—
>
> (1) Trade or Business Expenses.—
>
> (A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *"

The question of whether amounts paid to the United States, in settlement of claims or actions by the OPA for alleged overcharges, constitute deductible ordinary and necessary business expenses, is one which has been the subject of considerable litigation. Neither the Emergency Price Control Act of 1942, nor the Internal Revenue Code contains a specific provision either allowing or disallowing such payments as deductions. The law has been developed by decisions of the Courts in cases cover-

ing a variety of situations, and there are now certain guide posts for determining deductibility.

Early History.

As originally enacted, Section 205(e) of the Emergency Price Control Act of 1942 (50 U. S. C. App., Sec. 925(e) (1954) 56 Stat. 23, 33) provided that if a sale violated a maximum price regulation, and was "* * * for use or consumption * * *" in "* * * the course of trade or business, * * *" the Administrator could bring an action on behalf of the United States for treble damages, *i.e.,* three times the amount of the overcharge. No mention was made of single damages, *i.e.,* the exact amount of the overcharge. However, the Administrator developed a firm policy which came to be stated in Section 9.1601 of the OPA Manual.

That policy was also expressed in a letter written on April 1, 1944, by the then Administrator, Chester Bowles, to the Senate Banking and Currency Committee. He wrote "* * * that the protection of innocent violators from excessive damages * * *" was "* * * obviously desirable * * *"; and that it had been his "* * * *policy to adjust cases involving innocent violations by payment of merely the amount of the overcharge.* Congress gave the Administrator discretion to decide into [*sic*] what cases treble damage actions should be brought. That discretion has been exercised and will in the future be exercised to avoid undue hardship in deserving cases." (Emphasis supplied.) Hearings before the Senate and Banking Committee on S. 1764, 78th Cong., 2d Sess. 1415, 1417 (1944). Thus the Administrator expressed a sharply defined policy on overcharges. This policy distinguished between innocent good faith overcharges on

the one hand, and overcharges which were willful or the result of the violator's failure to take practical precautions to avoid violating the law. But whether the violation was in good faith or bad faith, the Administrator required the violator to surrender at least the overcharge itself. The payment of merely the overcharge was something quite different from the infliction of a penalty. By obtaining the overcharge, the Administrator made certain that the seller was not unjustly enriched to the disadvantage of his competitors. The policy of the Administrator illuminates the policy of Congress, for "Congress showed in 1944 by the amendment of Section 205(e) that it agreed with the Administrator." *Jerry Rossman Corporation v. Commissioner,* 175 F. 2d 711, 714 (C. C. A. 2, 1949).

Like the Administrator, Congress carefully discriminated between the violation which was innocent or inadvertent and the violation which was careless or willful, when the law was amended in 1944. In the amending law (S. 1764) as reported out by the Senate Committee on Banking and Currency, courts would have been authorized to award one and one-half times the amount of the overcharge "where violations occurred unintentionally and despite the exercise of due diligence to prevent them." Sen. Rep. No. 922, 78th Cong., 2nd Sess. 13-14 (1944). This Senate Bill and a companion House Bill (H. R. 494, 78th Cong., 2nd Sess. (1944)) were drastically revised on the floor after the extensive debates. Hence those debates, rather than the committee reports, articulate the relevant policy which Congress translated into law. These debates resulted in the provision in the law which came to be commonly known as the "Chandler De-

fense,"[1] which provided that "if the defendant [the violator] proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practical precautions against the occurrence of the violation," the violator need pay merely the amount of the overcharge. Stabilization Extension Act of 1944, Sec. 108, C. 325, 58 Stat. 632, 50 U. S. C. App. 1940 ed., Supp. IV, Sec. 925. Thus the 50% "penalty" provision in the bill as reported out by the Senate Committee, was eliminated from the law as passed by Congress.

Notwithstanding the clearly expressed policy of Congress not to penalize the non-willful violator, the Bureau of Internal Revenue, early in 1943, adopted a ruling which provided that amounts paid in satisfaction of judgments obtained in suits brought by the Price Administrator under Section 205(e) of the Emergency Price Control Act of 1942 (56 Stat., 23), for the violation of a regulation, order or price schedule prescribing a maximum price or maximum prices and amounts paid to the United States in compromise of pending or contemplated litiga-

---

[1]In discussing the Chandler Defense, Congressman Goodwin described it as follows:

> "This amendment does not protect the wilful violation of the regulations or the man who fails to take reasonable precautions, and that man deserves no protection. It does seek to protect the merchant who, in good faith, does all he reasonably can to cooperate and he ought to be protected."
>
> "The amendment leaves this bill thoroughly effective against the dishonest merchant and the chisler, but protects the honest merchant from being penalized for an honest mistake." (90 Cong. Reg. at 5886.)

Similarly Congressman Gwynne stated:

> "In other words, if he could show that he had cooperated honestly, then he would be excused from the penalty but would be required to pay the overcharge." (90 Cong. Reg. at 5887.)

tion in such cases were not deductible from gross income for Federal income tax purposes. I. T. 3627 (1943), C. B. 111. No differentiation was made in this ruling between the innocent and the willful violator.

In several of the early cases, the Tax Court of the United States disallowed such payments as ordinary and necessary business expenses, frequently on the theory that such payments constituted penalties for violating the law; that allowing deductibility of the penalty would mitigate the penalty and hence be contrary to public policy. Thus in *Scioto Provision Company,* 9 T. C. 439 (1947), the Court disallowed the deduction of $7,709 paid to the OPA in settlement of a claim for treble damages on account of alleged over-ceiling sales of meat products. Similarly, in *Garibaldi & Cuneo,* 9 T. C. 446 (1947), the Tax Court again disallowed a payment (one and one-half times the overcharges) to OPA as a deduction.

Then came the Tax Court's decision in what ultimately became one of the leading cases in this field, namely, *Jerry Rossman Corporation,* 10 T. C. 468 (1948). In that case, a converter of rayon and cotton fabrics found that due to the fact that actual shrinkage had been less than the tolerance allowable, it had, over the course of nearly a year, made overcharges amounting to slightly in excess of $3,000 on net sales of over $1,680,000. Upon discovering this fact, the taxpayer made a voluntary disclosure to OPA and paid the amount of the overcharge. The Tax Court (with seven Judges dissenting) disallowed the deduction. The case was appealed to and ultimately reversed by the Second Circuit. However, before the Second Circuit Court's decision was handed down, the Tax Court decided the additional cases of

Nazareth Mills, Inc., 8 T. C. M. 164 (1949); *New Orleans Motor Company, Inc.,* 8 T. C. M. 643 (1949); and *National Brass Works, Inc.,* 8 T. C. M. 286 (1949) (reversed and remanded, 182 F. 2d 526 (C. C. A. 9, 1950)), all on the authority of its own prior decisions discussed above. The *National Brass* case was appealed, and this Court's opinion, 182 F. 2d 526, has been a landmark case on this subject.

Rossman and National Brass Cases and Subsequent Developments.

The circuit courts reversed the Tax Court in both the *Jerry Rossman* and *National Brass Works* cases. In *Jerry Rossman,* the Second Circuit, 175 F. 2d 711 (C. C. A. 2, 1949) in an opinion written by Judge Learned Hand, held that:

(1) Payment of an overcharge—at least to the extent of single damages as distinguished from treble damages—is not a "penalty" whether paid to the purchaser or to the OPA.

(2) Even assuming such a payment is a penalty, not all penalties are nondeductible. Deduction is denied only when allowance of the deduction would frustrate sharply defined public policies.

(3) Acceptance by OPA of single damages is "positive and compelling" evidence that the Administrator himself, felt that the taxpayer had acted in good faith and had taken practicable precautions to avoid violation, and his action, standing alone, should be accepted as suffi-

cient evidence that allowance of the deduction would not "frustrate" any "sharply defined" policies of the Emergency Price Control Act of 1942.

Next came this Court's reversal of the Tax Court's decision in the *National Brass Works* case, 182 F. 2d 526 (1950). The Tax Court had disallowed a deduction for an amount paid to the OPA in compromise of an admitted price violation in the sale of certain non-ferrous castings. These violations had been discovered by OPA investigators. This Court reversed and remanded,[2] for further proceedings in conformity with its opinion (part of which is quoted at the end of this section) that courts must look beyond the mere payment to the circumstances which gave rise to the violation in an effort to determine whether it was willful, resulting in non-deductibility or non-willful, resulting in allowance of the deduction.

The rules of law announced in the *Jerry Rossman* and *National Brass* cases, *i.e.,* of allowing a deduction where it appears that the violation was made under circumstances which are inconsistent with an intent to violate

---

[2]On remand, the Tax Court held a further hearing and found that the price regulation involved required taxpayer to reduce its price 1½¢ per pound; that it had consulted its own counsel, who advised that prices should be so reduced; and that in disregard of its own counsel's advice taxpayer "* * * purposely, deliberately, and knowingly failed to comply with the price regulation." 16 T. C. 1055. The court held that to allow the deduction in these circumstances would frustrate the Price Control Act and hence disallow it. On a second appeal, this Court held that in view of the evidence adduced on remand, the Tax Court's second decision was not clearly erroneous, and affirmed it. *National Brass Works, Inc. v. Commissioner of Internal Revenue,* 205 F. 2d 104 (1953).

the law and inconsistent with a lack of due care to conform to the law, have been followed by all of the cases decided since.[2a] Thus the First[3] and Fourth[4] Circuit Courts have allowed deductions in two fairly recent cases. The Tax Court,[5] several United States District Courts[6] and

---

[2a]Appellee does not mean to imply that all subsequent cases have allowed deductions. There have been some notable exceptions, such as the following: *Henry Watterson Hotel Co.,* 15 T. C. 902 (1950), affirmed 194 F. 2d 539, C.C.A. 6 (1952), where taxpayer "* * * offered no explanations whatsoever as to the reasons for the overcharges. * * *" 15 T. C. at 906; *Walter Norwood Estate,* 11 T. C. M. 524 (1952), where the overcharges for hotel rooms were made in direct violation of a preliminary injunction issued by the United States District Court and no testimony was offered as to the cause of the overcharges; *Almor Dress Co., Inc.,* 11 T. C. M. 957 (1952), where the taxpayer continued to violate the regulations after an injunction had been entered against it; *Julian Lentin,* 23 T. C. 112 (1954), where the United States District Court had made a prior (to the Tax Court case) judicial determination (in the O. P. A. suit) that the violation for which the payment was made was willful; *Hull Senator Co.,* 13 T. C. M. 1005 (1954), where the taxpayer paid in settlement one and one-half times the amount of the overcharges; and *Nemrow Bros. Inc. v. United States of America,* 125 F. Supp. 604, D. C. Mass. (1954), where the taxpayer had paid treble damages and its attitude was so flagrant that the O. P. A. recommended suspension of its right to deal in rationed sugar for a period of three months.

[3]*Commissioner v. Pacific Mills,* 207 F. 2d 177, C. C. A. 1 (1953), affirming the Tax Court's decision, 17 T. C. 705 (1951). The Commissioner's original non-acquiescence in the Tax Court's decision has been withdrawn, and acquiescence indicated. 1954-12 I. R. B. 3.

[4]*American Brewery, Inc. v. United States of America,* 223 F. 2d 43, C. C. A. 4 (1955).

[5]*Philip E. Ludwig,* 13 T. C. M. 471 (1954); *Klinck,* 11 T. C. M. 1224 (1952); *Michael Markovits,* 11 T. C. 823 (1952); *Albert C. Drucker,* 11 T. C. M. 680 (1952); *Paris Mfg. Co.,* 10 T. C. M. 1064 (1951), Government's appeal to C. C. A. 1 dismissed (*nolle pros*), April 14, 1952; and *Farmer's Creamery Co. v. Fredericksburg,* Va., 14 T. C. 879 (1950), and the Commissioner has indicated his acquiescence in the O. P. A. deduction portion of the decision. 1954-20 I. R. B. 4.

[6]*Marantz v. Yoke,* 113 F. Supp. 536, D. C. N. D. W. Va. (1953); *Stinson & Dickensheets, Inc. v. United States,* D.C. NJ.,

the United States Court of Claims[7] have also allowed deductions in a number of cases involving a variety of factual situations.

So compelling has been the effect of the *Rossman* and *National Brass* decisions, and those which have followed, that the Commissioner of Internal Revenue himself has relented from his prior ruling discussed above and adopted the rationale of the Courts. Thus, during 1954 he issued a new ruling on this subject, modifying his prior 1943 ruling, which new ruling provides in part as follows:

> "Upon reconsideration of this question, in the light of the above-cited courts decisions, it is held that payments made to the United States for violation of the Emergency Price Control Act of 1942, 56 Stat. 23, 34, Office of Price Administration regulations, orders, or price schedules, are deductible as business expenses, under section 23(a)(1)(A) of the Internal Revenue Code, if the taxpayer proves that the violation was neither willful, intentional, nor the result of the failure to take practical precautions.
>
> I. T. 3627, C. B. 1943, 111; I. T. 3630, C. B. 1943, 113; I. T. 3799, C. B. 1946-1, 56; and I. T. 3800, C. B. 1946-1, 82, are hereby modified to the extent inconsistent with the views expressed herein." (Rev. Rul. 54-204, 1954-1 I. R. B. 50-51.)

March 26, 1953, 1954 C. C. H. par. 9428; *Woods Cross Canning Co. v. Korth*, D. C. Utah, Jan. 20, 1953, 1953 C. C. H. par. 9200; *Maier Brewing Co. v. United States*, D.C. S.D. Cal. C.D., No. 12534-C, Jan. 31, 1952, 1952 C. C. H. par. 9208; *Utica Knitting Co. v. Shaughnessy*, 100 F. Supp. 245, D.C. N.D. N.Y. (1951).

[7] *Hershey Creamery Co. v. United States*, 101 F. Supp. 877 (1952).

We fail to find this ruling even mentioned in Appellant's Brief.

The state of the law on this subject at the present time can be best summarized in the language of this Court, as follows:

> "It seems to us that allowance of the sum paid to the government may be allowed as a business deduction when the overcharge has been innocently and unintentionally made and not made through an unreasonable lack of care. * * *
>
> * * * * * * * *
>
> Where the payment has been made in circumstances which are inconsistent with intention to violate the Act and inconsistent with a lack of due care to conform to the law it would be an ordinary and necessary expense. Allowance of the deduction in these circumstances could not frustrate the enforcement of the Act." (*National Brass Works, Inc. v. Commissioner of Internal Revenue,* 182 F. 2d at 530 and 531.)

We shall now proceed with a review of the evidence in this case in an effort to determine whether the District Court's findings and conclusions that the alleged violation here involved were made under circumstances which are inconsistent with intention to violate the Act and inconsistent with a lack of due care to conform to the law, are supported thereby and are not "clearly erroneous."

The Evidence Abundantly Supports the District Court's Findings and Conclusions and Establishes That They Are Not Clearly Erroneous; the Administrative Acceptance of Single Damages Is Positive and Compelling Evidence Supporting Deductibility.

Appellee contends that the following uncontradicted evidence establishes that the District Court's findings of fact and conclusions of law are amply supported and are not "clearly erroneous."[7a]

Confusion Over Ceiling Price.

The general maximum price regulation, which was issued on April 28, 1942, fixed the price at which Appellee could sell its products at the same price at which it had sold them during the month of March, 1942. [Ex. 16, p. 1.] Since Appellee had not sold fancy light meat tuna during March, 1942, it was required, under GMPR, to adopt as its ceiling price for that commodity the price which was charged during that period by its nearest competitor. There was considerable dispute and confusion among Appellee's officials as to who was its nearest competitor. John V. Morris, general counsel of Appellee, was consulted about which company would be Appellee's nearest competitor. [R. 111.] He advised M.

[7a]Rule 52(a) of the Federal Rules of Civil Procedure provides in part as follows:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

Where there is sufficient evidence to sustain findings which the District Court made adverse to the position of Appellant on various questions of fact, the judgment will be affirmed on appeal. (*Rose v. United States,* 188 F. 2d 474 (C. C. A. 9, 1951).

J. Bogdanovich, Appellee's president, that Van Camp Sea Food Company was not comparable and that other packers like "* * * Coast Fishing Company in Wilmington, which is a few miles from their plant in the same harbor, or West Gate Seafood in San Diego, due to their size and due to our size, and tuna packing, would be more comparable or nearer competitors of ours." [R. 114.] Moreover, he advised that Appellee could sell its fancy light meat tuna through High Seas Tuna Packing Company of San Diego, which was under common control with Appellee, at a ceiling price of $14.00 per case, which had been fixed by the OPA. [R. 92, 114-115, 209-210.] Appellee's president rejected these suggestions because "* * * he didn't want to profiteer * * *." [R. 116.] On the contrary, he accepted the suggestion of Mr. A. T. Williams, Appellee's sales manager, and used as Appellee's ceiling the $11.00 price which was that used by Van Camp Sea Food Company, admittedly the lowest price in the industry.[8] [R. 111, 164-165, 173-174.]

In this connection it must be remembered that we are dealing with a time (the Summer and Fall of 1942) when OPA was very new to industry. There were grossly inequitable situations resulting from GMPR which were recognized by everyone, including OPA officials. [R. 80-81.] Steps were being taken to remedy these inequities. [R. 165-167.] So far as tuna was concerned, prices

[8]Van Camp sold very little fancy light meat tuna, and concentrated on other products primarily so that their "* * * profitable business on products from tuna livers and oils, which has grown to an extent which might even cause them to lose interest in possible profits on canned tuna. A very low ceiling on canned tuna might not discommode Van Camp but might be harmful to other canners who did not have the foresight to develop a business on the livers and oils from tuna." [R. 207.]

upon the same product at the same time ranged from a low of $11.00 to a high of $14.00, or more. [R. 92.] That these inequities existed was recognized in the Statement of Considerations[9] accompanying the issuance of Regulation 299 on January 7, 1943, when the price of fancy light meat tuna was fixed at $12.00 per case.

Economic Dilemma.

While Appellee was attempting to sell its canned tuna at the lowest fixed ceiling price in the industry as a result of its own conservative interpretation of GMPR, the cost of its raw fish was steadily and rapidly rising since no ceiling prices were fixed upon the price of raw fish by GMPR. For instance, pursuant to an inquiry Appellee advised Mr. Charles W. Triggs, Chief of the Fish and Seafood Division of the OPA in Washington, that its prices for yellowfin (tuna) had risen from $160.00 per ton at the beginning of the season in 1942 to $210.00 per ton in August. [R. 208-209.] This admittedly inequitable situation was recognized early and finally remedied (some six months or so after the alleged violation here involved) by Regulation No. 366, issued on April 13, 1943, which fixed the price of fresh tuna. In the Statement of Considerations which accompanied the issuance

---

[9]Therein it was stated:

"* * * Because of the rapidly rising market and the fact that in March canners were closing out their previous season's pack, *the ceiling prices established by various canners under the General Maximum Price Regulation vary widely*. Listed ceilings reported to OPA for Standard White Meat, for example, show a range of from $20 to $24 per case; Fancy Light Meat from $21 to $28 per case." (Emphasis supplied.) [Ex. 24, p. 7.]

of that Regulation, the rapidly rising price of raw fish was confirmed.[10]

Production Urged.

We are also dealing with a time, during the latter part of 1942, when all canners were being urged to produce and distribute as much of their product as possible because of the growing needs of the civilian economy and the armed forces. Thus, in a letter dated November 16, 1942, Appellee advised the OPA that it was relying upon a statement made by Secretary Wickard at a meeting which was attended by Appellee's sales manager in Washington, on May 8, in which the Secretary was quoted as saying:

> "* * * 'We know that there are many errors in the General Maximum Price Regulation. *We know there are many inequalities. We know that the order was hastily prepared and that many canners will be discriminated against and that many will be treated unfairly.* Therefore we must concern ourselves and continue working to the end that these inequalities be eliminated. *We want production and we do not want anything in this regulation to retard production.*'" (Emphasis supplied.) [R. 214.]

---

[10]Therein it was stated:

"By the end of 1941, yellowfin was bringing $130.00 per ton. Early in 1942 the price jumped to $160.00, and by the end of the season the price had advanced to $190.00. Including bonuses paid fishermen, the 1942 year ended with an average price of $200.00. * * *" [Ex. 25, p. 4.]

This statement of Secretary Wickard was also considered by Appellee's legal counsel when he advised the course of action which gave rise to the alleged violation.[11]

This need for production was also confirmed in the Statement of Considerations issued by the Office of Price Administration at the time, April 13, 1943, it fixed the price of fresh tuna fish.[12]

Negotiations With OPA Officials.

Faced with the dilemma of the lowest ceiling in the industry, rapidly rising prices of raw fish, and the pronouncements urging production discussed above, Appellee, through its sales manager, A. T. Williams, conducted extensive negotiations with OPA officials seeking relief from its intolerable position. Mr. Charles W. Triggs,

---

[11]In this connection Mr. Morris testified:

"A. We were always reading about pronouncements. I have in mind now one pronouncement that was brought back to my attention in the correspondence that I think was just introduced in evidence, a statement to, I believe, Doc Williams and these other people, and they were gathered in Washington at a meeting by Secretary Wickers [*sic*] to the respect that these regulations were hastily drawn; that they were recognized to be imperfect; that they were subject to correction.

* * * * * * * * * *

"The Witness: And that there would be many inequalities, or words to that effect, that many canners would be hurt, that these would be eliminated or worked out as time went on. And that we could not let these inequalities stand—or these regulations stand in the way of production—which led me to believe that OPA would correct anything that was wrong, because that was the pronouncement from there." [R. 120-121.]

[12]Therein it was stated:

"The armed forces this year are vitally interested in obtaining canned tuna. Stability in the market at this time is mandatory. It now appears that 60 per cent and possibly more of the tuna pack will be acquired for the armed forces. Con-

who was at that time Chief of the Fish and SeaFood Division of the OPA in Washington, testified as follows:

> "During that summer [1942] Mr. Williams came to Washington. We discussed their situation and there was some talk about prices that they might be entitled to, and I think that at least four or five times Mr. Williams must have seen me before the regulation—the new regulation went into effect." [R. 157.]
>
> * * * * * * * *
>
> "And—pardon me—he also telephoned numerous times from Terminal Island to see if we were going to get out the regulation." [R. 158; see also 164.]

In addition, the record discloses several items of correspondence between Appellee and the OPA regarding the ceiling prices on tuna. [See Exs. 2 to 10; R. 200-219.]

During these negotiations Appellee was led to believe that it was entitled to an increase in its ceiling price. Triggs testified:

> "Mr. Grady: 'Q. Was it your opinion after talking with Mr. Williams and investigating their

---

tracts may be entered into with some degree of certainty now that canners' prices will not be changed by reason of uncontrolled prices for the raw product.

* * * * * * * * * *

"Having already established prices for canned tuna which bears *(sic)* a proper relationship with the prices fixed in this Regulation for the fresh fish, there should no longer be any uncertainty or unrest in any part of the entire industry. Producers, canners and distributors have fair ceiling prices on which to operate their businesses. This in itself should encourage peak production, particularly since the history of the industry discloses that disharmony created over price quarrels has been a most disturbing factor. After the armed forces have been supplied their quotas, civilians will be able to purchase tuna at the same prices now being paid. * * *." [Ex. 25, p. 5.]

ceiling prices that their ceiling prices were too low and some relief should be given to them?'

*   *   *   *   *   *   *   *

'A. I was certainly of that opinion.

Q. And did you have that opinion in the summer of 1942? A. In the summer of 1942.

Q. Yes. Did you so state to Mr. Williams? Did you advise Mr. Williams that the prices were too low or did you agree with Mr. Williams that their ceiling prices were too low?'

*   *   *   *   *   *   *   *

'A. I didn't advise him. I agreed with him that the prices were too low.

Q. That's what I mean. Having determined in the summer of 1942 that the ceiling prices of French Sardine Company with respect to canned tuna were too low, what steps did you take or were taken by the OPA to alleviate that situation?

A. No steps were taken that would alleviate that. That is, nothing was done until the new regulation came out. Consideration was given to the situation through the summer and fall of 1942, but owing to the amount of work that we had getting out other regulations, amendments and so forth, we did not have the staff to get out a tuna regulation until—the record shows—January 13th; but it was well known through the latter part of the summer of 1942, not only by myself but by members of the staff, that we had to have a higher level of prices which in addition —outside of tuna would apply to other commodities as well, such as I stated before on salmon.'" [R. 165-167.]

*   *   *   *   *   *   *   *

"A. In August 1942 we [Triggs and Williams] discussed what was doing on other canned fish, and

I am quite sure I left the impression with him that they would be entitled to an increase in price because I felt sure we were going to establish a higher price —in fact, I knew we were—establish a higher price than $11; and even if it was based on the average of the various canners it would be not only $12 but I think higher than $12. So that was the reason why I would have discussed with him the possibilities of an increase in price." (Emphasis supplied.) [R. 172.]

"'Q. By Mr. Mackay: Well, under those circumstances is it fair to deduce from your testimony that the industry was reasonable in its expectation that a higher price would be fixed?'

* * * * * * * *

'The Witness: I think that would depend largely upon the members of the industry. A canner who was fortunate to have a high ceiling price under general max would not be so anxious I think to see the regulation of [*sic*] a canner who had a low ceiling price." [R. 174-175.]

Moreover, new dollar and cents ceiling prices were actually fixed on several canned fish products during the late Summer and Fall of 1942, by issuance of the following regulations:

Regulation No.	Date	Product	Ex. No.
184	July 23, 1942	Maine Sardines	17
209	Aug. 31, 1942	California Sardines	18
247	Oct. 24, 1942	Domestic Canned Crabmeat	20
252	Oct. 30, 1942	Vinegar Cured Herring	21
265	Nov. 9, 1942	Salmon	22
277	Nov. 28, 1942	Mackerel	23

The ceiling prices fixed by these regulations were higher than the lowest ceilings under GMPR. For instance, Regulation No. 209, effective August 31, 1942, fixed the prices at which Appellee was entitled to sell its sardines at figures which averaged 20.9% higher[13] than the ceiling price which Appellee had had under GMPR. [R. 42, 144.]

Increased Inventory and Low Cash Position.

While awaiting the new anticipated dollar and cents ceiling prices on canned tuna, Appellee accumulated a rather large inventory with a value of over a half million dollars. [R. 216.] During the last week in August and the first three weeks of September, 1942, Appellee shipped about 40 carloads of canned tuna without invoicing it. [R. 205.] Toward the end of September Appellee's cash position became relatively low. Whereas Appellee's cash expenditures averaged approximately $235,000.00 per week during the sardine season months of October through December, Appellee had on hand cash in the amount of $144,919.07 as of September 24, 1942, *i.e.,* less than a week's supply to pay plant payroll, trade accounts, fishermen accounts and other cash requirements. [Ex. 33.]

---

[13]Since Triggs cited these new regulations as examples of what could be expected to be done on tuna, *i.e.,* that additional costs were to be reflected in the new dollar and cents ceilings, it would appear that appellee was again conservative in selling its tuna at $12, an increase of only $1, whereas a 20.9% increase would have warranted an increase of $2.30, *i.e.,* to $13.30 per case. [R. 158, 173.]

The Alleged Violation.

Faced with this situation, *i.e.,* a large inventory, 40 carloads of tuna shipped but not invoiced, a critically low cash position, and expecting a new dollar and cents ceiling price to be issued "momentarily," Appellee was forced to take some action in the latter part of September, 1942, to prevent financial disaster and "complete liquidation." [R. 198, 205, 210.] Accordingly, acting upon the advice of its counsel[14] [R. 120] it invoiced its brokers and placed the following notation upon the invoices:

> " 'Please remit in accordance with this invoice. If O.P.A. fails to promulgate an order stabilizing or equalizing prices on the products covered on or before October 31st, we agree to revert back to our March ceilings, which are $1.00 per case less on 48/½s and $2.00 per case less on 48/1s, and will refund you accordingly.
>
> French Sardine Company, Inc.' " [R. 238.]

---

[14]In the second Tax Court hearing in the *National Brass* case the court found that the taxpayer acted against the advice of counsel and denied the deduction. 16 T. C. 1051. However, the Tax Court has also held that acting upon the advice of counsel constitutes taking reasonable precautions. Thus in *Philip E. Ludwig*, 13 T. C. M. 471 (1954), three members of a partnership, who consulted their attorney and followed his advice were held to have taken reasonable precautions to avoid violating the law and had not intentionally violated, notwithstanding the amount paid in settlement constituted 150% of the amount of the overcharges. In declining to make a finding that the violation was intentional the court stated:

> "* * * We think that such a finding is precluded by the reliance of the partners on the advice of counsel throughout the period of regulated prices. The evidence shows that while the partnership was restricted as to the selling price of coffee, there was no control over the amount it had to pay. The resultant squeeze on the partnership would not, of course, justify a violation of the regulations, but the partners naturally sought by every lawful means to escape from this economic dilemma. * * *" 13 T. C. M. at p. 473.

Simultaneously, Appellee sent a mimeographed notice to all of its brokers, reciting the above notation and advising them to bill with a similar notation upon their invoices, and also advising them as follows:

> "We have been advised many times direct from the Washington office of O.P.A. about their intent to equalize the vast differences in prices between canners. We have been repeatedly told that we may expect an increase on the low ceilings and a decrease of the high ceilings.
>
> "When on August 26th, the O.P.A. actually took this step on the item of California Sardines, we believed that similar relief would be forthcoming shortly on the other items. However, these government agencies have so many angles and so many people to please or placate that undue delays sometimes arise."[15] [R. 237.]

On that same day, September 24, 1942, Appellee advised Mr. Triggs by letter of the action it was taking and also sent him a copy of its notice to brokers. [R. 168, 175, 198, 205.] Indeed, there is substantial evidence to indicate that Triggs gave at least tacit acquiescence to the action taken by Appellee. He testified:

> "A. Well, I might have made the statement that I would support anything that they might do if it

---

[15]It is significant in this connection that Mr. Triggs testified as follows:

> "Q. By Mr. Mackay: Mr. Triggs, was the delay in getting out a new price ceiling regulation caused in any respect by your unwillingness to set a higher ceiling price on French Sardine tuna?
>
> "A. Not at all. The delay was entirely caused by the amount of work we had to do in getting out various regulations, not only canned fish but frozen fish and fresh fish. We had an immense amount of work, a limited staff, and it takes quite a long time to gather—it did take quite a time to gather the necessary information that would warrant our establishing the regulation." [R. 174.]

was within reason. That would be logical for me to do. Inasmuch as we were allowing increased prices on other canned fish, I might possibly have made the statement they wouldn't be taking any chances or something of that kind.

Q. I didn't hear you.

A. That they might not be taking any great chances in raising the price because I was of the firm belief that they were in a bad position." [R. 159.]

Moreover, Appellee's counsel (Mr. Williams—sometimes referred to as "Doc"—having died before the trial) testified as follows:

"* * * And Doc's contacts with Triggs, his phone calls with Triggs, his correspondence with Triggs—as I remember it, Doc stating as to what Triggs said to him, especially with respect to the price ceiling, and that we thought—then that Doc thought that it was all right to go ahead and base our prices at $12." [R. 119.][15a]

[15a]The Government argues that Appellee did not take practicable precautions since it should have formally applied for a price adjustment ruling pursuant to the provisions of Procedural Regulation No. 1, 7 Fed. Register 971 (pp. 18-19, Brief for the Appellant). This argument has already been rejected by the First and Fourth Circuit Courts of Appeal. In the *Pacific Mills* case, the First Circuit Court stated in part as follows:

"* * * we do not see how it can be said that practicable precautions were not taken because an advisory ruling was not requested unless we are willing to say that 'practicable precautions' means every precaution, which would rob the phrase of its meaning, for either there would have to be resort to Procedural Regulation 1, in which event there would be no violation, or else there would automatically be a failure to take 'practicable precautions.'" (207 F. 2d at 183.)

See, also:

American Brewery v. United States, 223 F. 2d 43, 48 (C. C. A. 4, 1955).

A total of 97,215 cases were billed, as indicated above, prior to the time Regulation No. 299 was issued on January 7, 1943, which fixed the price of fancy light meat tuna, basis 48/½s at $12.00, exactly the price reflected in Appellee's invoices to its brokers. Subsequently OPA claimed that there was a violation of GMPR, which claim was settled in May, 1943, by Appellee paying the exact amount of the overcharges to the Treasurer of the United States.

The Significance of the Settlement.

Appellee contends that the Administrator's acceptance of single damages, *i.e.,* merely the amount of the overcharge, in lieu of treble damages, has great probative significance in this case. Judge Learned Hand placed great emphasis upon the probative effect of such a settlement in writing the Court's opinion in the *Jerry Rossman* case. In discussing whether single damages are deductible, whether or not denominated a "penalty" he stated:

> "This conclusion leads directly to the third question: whether, even though the overcharge was a 'penalty,' its allowance as a deduction would 'frustrate' any 'sharply defined policies' of the Emergency Price Control Act of 1942. It is impossible to find an answer in general terms; indeed any answer goes to the very root of one's theory of criminal law. Happily, in the case at bar, we are not left to speculation, for we have an answer from the best possible source—the Administrator himself. * * * It seems to us that we should accept these expressions as evidence that in cases where the Administrator accepted the overcharge as sufficient, it did not 'frustrate' any 'sharply defined' policies of the Emergency Price Control Act of 1942." (175 F. 2d at 713-714.)

And later in the opinion Judge Hand stated further:

> "* * * Third, we say that there was positive and compelling evidence that to allow such a deduction would not 'frustrate' the policies of the underlying act. * * * The practice of the Administrator was to accept the overcharge as adequate compliance only if the seller had both acted in good faith, and had taken all 'practicable precautions'; * * *. * * * the Administrator's consent to accept the overcharge showed that he thought that the taxpayer had in fact used adequate care; and that was enough. We do not say that his decision was final; but it stands uncontradicted, and it was the judgment of one who was in the best possible position to make an estimate."[16] (175 F. 2d at 714.)

In the instant case we have much more than a mere record of acceptance of single damages by the Administrator. And in this connection it is significant that Appellant's brief is strangely silent upon significant portions of this evidence, which consists of the decision of the local enforcement officials in Los Angeles and the decision and testimony at the trial of the two top Govern-

---

[16]Judge Hand's suggestion has apparently been adopted as a matter of policy by the government. When it was again found necessary to impose rigid price controls on the economy during the Korean War, the President of the United States was given the power to prescribe the extent to which any payment made to the United States in compromise of a violation of price ceilings shall be disregarded in determining expenses or costs, for all purposes including computation of taxable income. Sec. 409(d) of the Defense Production Act of 1950, 50 U. S. C. 2109(d). By Executive Order 10161 (15 Fed. Register 6105, September 12, 1950) these powers were delegated to the Administrator of the Economic Stabilization Agency. General Order No. 15 (17 Fed. Register 2994, effective April 5, 1952) gives to the Director of Price Stabilization (who is in a position quite similar to that of the Administrator in the instant case) the power to determine the extent to which any payment made on account of a violation shall be dis-

ment officials in Washington responsible for fixing the prices of tuna and enforcing the prices fixed, namely, Triggs and Herman A. Greenberg.

First, let us consider the settlement effected at the local (Los Angeles) level. In a letter to Mr. Triggs, dated May 6, 1943, Mr. Williams described the opinion of the local officials and their reasons for settling the alleged violation for single damages, thus:

> "* * * We were told that we had violated the General Maximum Price Regulations although it was admitted that we did not violate the intent or purpose of the act.
>
> Then we were told that, in view of the extenuating circumstances, the enforcement agency would be lenient to the extent that they would consider the matter closed if we would present them with a check in favor of the Treasurer of the United States for the exact amount, not treble damages, of what they considered the excess charges, as a contribution to the war effort.
>
> * * * We were told that, inasmuch as the matter is in the hands of the enforcement agency,

---

regarded for tax purpose and, through the National Enforcement Commission, to certify said amount to the Bureau of Internal Revenue. General Order No. 18 (17 Fed. Register 6925, July 29, 1952). General Disallowance Order 1 (17 Fed. Register 9934, effective October 24, 1952) sets forth the criteria for determining whether such payments shall be disallowed, and states in part:

> "Sec. 2(b) * * * *Provided, however,* that *the amount so paid to the United States* or to any buyer *shall not be disregarded for any purposes or to any extent if the total of the amount so paid* (exclusive of attorney's fees, court costs or interest, if any) *does not exceed the total amount of the overcharge or overcharges* upon which such liability, right of action, suit, or judgment was based. * * *" (Emphasis supplied.)

The Commissioner of Internal Revenue has agreed to accept the judgment of the price enforcement authorities for tax purposes. I. T. 4105, 1952-2 C. B. 9.

we have no other recourse but to comply with their offer of settlement." [R. 221-222.]

In compliance with OPA's offer of settlement, Appellee delivered its check dated May 20, 1943, payable to the Treasurer of the United States, which was sent, together with a report of the whole matter, to Washington for advice as to whether, under the facts of this case, single damages should be accepted in view of the Administrator's existing policy. In Washington, the matter was handled personally by Herman A. Greenberg, who was at the time the Chief of Enforcement of the Meat and Dairy Products Branch. [R. 70, 197.] Mr. Greenberg testified at the trial as a witness called on behalf of Appellee. He described the Administrator's existing policy and the Los Angeles official's action in these words:

> "* * * as a strict administrative policy, which we adhered to at that time, our instructions from the Washington office to our regional office and district offices was that under no circumstances, with one exception, would less than treble damages be accepted in a claim by the administrator. That exception was where we were satisfied that the violation was innocent and inadvertent and non-willful. Only in that case were they to accept less than treble damages, * * *. * * *
>
> Now then, with that policy in mind it was necessary for me at the time that I wrote this memorandum to make a decision. The Los Angeles District Office of the OPA, which was negotiating this with the French Sardine Company, realized that it could not accept a single damage settlement under our policy unless a showing of inadvertence and

> nonwillfulness was made; and it was for that reason that the Los Angeles District Office, which had normally the authority to settle its own cases, wrote to Washington to get permission on a showing of the facts to settle this for less than treble damages—that is, single damages—pointing out that in their opinion this was a nonwillful, inadvertent type of violation." [R. 77-78.]

Next let us examine further testimony of Herman A. Greenberg. He was the person, charged with the responsibility of enforcing the regulations which Triggs issued. [R. 73.] Here was the man who, in the language of Judge Learned Hand, "* * * was in the best possible position * * *" to judge whether the violation was willful, or the result of failure to take practicable precautions. This is what Mr. Greenberg said:

> "The Witness: My best recollection is that on receipt of this memorandum from the Los Angeles District Office of the OPA I went to see Mr. Triggs and asked him what conversations and negotiations he had had with the French Sardine Company. He advised me generally of those conversations and showed me a file which he had which consisted of written communications from the French Sardine Company from which all these facts appeared—that is, the fact that the company had been caught with a very low ceiling price under the general maximum regulations, that they had continued to can tuna but put it in inventory because they had stated they couldn't afford to sell at their ceiling price because of the increased price of raw tuna; that this was going on for a long period of time; was becoming burdensome to the company; that they inquired of Mr. Triggs what relief they could have; that Mr.

Triggs assured them a dollar and cent regulation would issue and that probably the price would be in the neighborhood of $12 a case; that nevertheless the company refrained from shipping tuna until finally with the regulation, the dollar and cent regulation not issuing, in desperation they come back to Triggs and between them they advised the Government wholly—

*   *   *   *   *   *   *   *

The Witness: —that the French Sardine Company kept Mr. Triggs advised and suggested to him that they ship this tuna at $12 a case with an agreement with their customers if and when the dollar and cents regulation issued, if it came out anything less than $12 they would refund the difference to them.

I discussed with Mr. Triggs whether he had those conversations and he agreed that, generally, he had had those conversations; he was very much in sympathy with the position of the company. I took the position myself—it was my duty to make a decision, and I took the position myself that the company had acted aboveboard, no willfulness, as we understood it, willfulness which we ran into in great number in those years, and which consisted of fraud of one kind or another, double entry, double sets of books, cash on the side and that sort of thing, but this company to the contrary had operated absolutely in the open; and that they had discussed their matter with a person who has ostensible authority for the Government—that is, Mr. Triggs. Mr. Triggs is a fine gentleman. And that they then proceeded on the basis of their discussions with Mr. Triggs, and I felt that this fit our policy of innocence and inadvertence, that the company did what it could and

reasonably proceeded the way it did as a general exception to our rule of acceptance of single damages." [R. 80-82.][16a]

Then, too, Mr. Triggs himself had a firm contemporaneous opinion in respect of whether the alleged violation was willful. He testified as follows:

> "A. I would say it was a technical violation. I couldn't say it was a willful violation. It might be a technical violation." [R. 179.]

Mr. Triggs was shown Appellee's check for $97,215.00 (representing single damages) by Mr. Greenberg in Washington and asked whether, in his opinion, it should be accepted or whether the government should seek treble damages. He testified:

> "Q. And will you please state again what you said when you were shown that check? A. I told —I explained the circumstances of how that was received by the government, by OPA in Los Angeles, and told him that, knowing what I did, if I had my way I would return the check to the French Sardine Company * * *."
>
> * * * * * * * *

[16a]We are not left to Mr. Greenberg's present recollection of the matter. There is in evidence, as Exhibit No. 1, an official memorandum which he wrote on June 5, 1943, contemporaneous with his decision. That memorandum states in part as follows:

> "* * * On the basis of Mr. Triggs' statement to us it appears that there is a substantial reason for accepting single damages. He claims that the Company had a fairly low ceiling under the GMPR last fall. The ceiling was $11 per case while competitors ceilings went as high as $17 per case. The Company was in constant communication with the Price Division of the National Office requesting relief and were assured that a dollar and cent regulation which would give them relief was to be issued momentarily. * * *" [R. 198.]

'Q. And you made that statement in June of 1943? A. June 1943.

Q. Let me ask you this: If that statement you then made to Mr. Greenberg was based upon your conviction at that time as Chief of the Fish Section that there had been no violation or intention of violation of the law or regulations by the French Sardine Company?'

* * * * * * * *

'The Witness: I based that on the knowledge that I had received and knowing that the French Sardine Company had tried to go along with OPA and not violate and knowing what the price of tuna—price of other canners, I had no hesitancy in stating that French Sardine Company should not be prosecuted for violation because what they did was really open and above board.

Q. By Mr. Mackay: In your dealings with the French Sardine Company during 1942 did you find anything in connection with this ceiling price, any act on their part which would indicate that they did not want to come along and not co-operate with the Price Administration Office?

A. Not at all.

The fact that they communicated with me repeatedly, called me on the phone, and Mr. Williams visited me in Washington, my office there, the Office of Price Administration, at different times, assured me that there was no effort being made on their part to violate. I was conversant with what was going on." [R. 170-172.]

Thus we have here strong expressions, by the men primarily responsible for administering the OPA law and regulations, to the effect that the alleged violation

was not willful, but that what Appellee did was in a good faith attempt to comply with the law. Appellee suggests that this evidence strongly supports the District Court's findings and conclusions.

The Government (on pp. 22 to 25 of Brief for the Appellant) contends that the administrative determination to accept merely the amount of the overcharge is not binding upon this Court and does not bring into play the doctrine of *res judicata*. Appellee does not contend to the contrary. Appellee's contention is simply that such action in this case constitutes, as it did in the *Jerry Rossman* case, "* * * positive and compelling evidence that to allow such a deduction would not 'frustrate' the policies of the underlying act. * * *" (175 F. 2d at 714); and further, that the administrative determination is significant uncontradicted evidence which this Court may consider in deciding whether the lower court's findings are "clearly erroneous."

The government, in seeking to dilute the force and probative effect of the Administrator's action in this case, relies heavily upon *George Schaefer & Sons, Inc. v. Commissioner,* 209 F. 2d 440 (C. C. A. 2, 1954). In discussing the question of the significance of the administrative settlement in that case the Court said in part, as follows:

> "The settlement means very little since, at the time it was effectuated, the OPA had expired (on June 30, 1947—50 U. S. C. Appendix, §901), and we may surmise its staff of lawyers and investigators had been disbanded. On that account, the investigation necessary to prove the case at trial against the taxpayer may have been unavailable. * * *" (209 F. 2d at 441.)

The settlement involved was effected on October 31, 1947, more than two full years after the end of the war and also long after OPA had been discontinued.[17]

In the instant case the exact opposite situation prevailed. The settlement was effected on May 20, 1943, when OPA was in full bloom; when it was carrying on a most vigorous enforcement program to make object lessons out of violators for the purpose of deterring others from violating the Act. In this connection Mr. Greenberg testified as follows:

> "* * * The war was going badly for us at that time. We were under the most insistent pressure at the time, both from Congress and other sources, to—
>
> * * * * * * * *
>
> The Witness: —to enforce these regulations vigorously. That we attempted to do. * * *" [R. 74.]
>
> * * * * * * * *
>
> "The Witness: At that time in 1943, as I said, we were under instructions to proceed very vigorously in the enforcement of these regulations, and we did to the utmost of our ability. * * *" [R. 76.]

In view of the compelling differences in circumstances surrounding the administrative settlement in the two cases,

---

[17]There are other facts in the *Schaefer* case which may have had a bearing upon the Court's decision to affirm the Tax Court's disallowance of a deduction. For instance there was testimony of an officer of the taxpayer that he inquired of OPA concerning whether there was to be an increase in the price of turkeys and learned nothing about any such proposed action. Moreover, the taxpayer did not urge in the Tax Court nor in the Circuit Court that any new amendment regulating turkey prices was promulgated. These facts alone distinguish the *Schaefer* case from the instant case.

Appellee urges that the *Schaefer* opinion is of little or no significance.[18]

Appellee respectfully urges that all of the above described evidence amply supports the District Court's findings and establishes that they are not clearly erroneous.

The Hershey Creamery Company Case.

Appellee contends that from a factual standpoint the case of *Hershey Creamery Company v. United States,* 101 Fed. Supp. 877, Ct. of Cl. (1952), is probably the decided case most closely parallel to the facts in the instant case. In the *Hershey* case the taxpayer, a manufacturer of dairy products (principally ice cream), found it necessary to seek relief from existing price ceilings on its products because of rising costs. It filed three separate applications for relief with OPA—all of which were denied, ultimately. However, on two separate occasions, while the applications were pending, the taxpayer inquired of OPA officials concerning their status and was advised that an order granting relief would be forth-

---

[18]It is interesting to note how inconsistent the government's position has been upon the question of whether the Administrator's determination is entitled to any weight. Thus in the *Pacific Mills* case, where the taxpayer had paid slightly more than the single damages for which OPA might have brought action—due to the statute of limitations, the government's contention is described by the Court as follows:

> "Then the Commissioner asserts that the Tax Court erred in its ultimate conclusion because it did not 'accord proper respect' to what he calls the 'Administrator's judgment' that Pacific Mills had failed to take practicable precautions. * * *" (207 F. 2d at 183.)

Apparently the government's position is that the Administrator's judgment is entitled to respect only when it has been exercised in a manner favorable to the government. Merely to state such a proposition refutes it.

coming shortly. Although the order was not forthcoming as promised, plaintiff increased its maximum selling prices sometime during the first two weeks of February, 1943. In June, 1943, in reliance upon similar advice, plaintiff again increased its price (it having been meanwhile lowered to the proper ceiling) and kept selling at the increased price until the application for relief was denied in August, 1943. Thus for two separate periods (once for two weeks and once for approximately two months) plaintiff overcharged its customers. However, the Court of Claims allowed the $81,118.62 paid by plaintiff to OPA, in settlement of a suit for treble damages which had been filed, as a deduction, saying:

> "Plaintiff has established to our satisfaction that the overcharges were unquestionably exacted in good faith, and without intent to violate the ceiling prices. Plaintiff had been in repeated contact and conference with the officials of the Office of Price Administration concerning relief prior to the dates of both price increases, and when it eventually raised its prices, it did so only in reliance upon statements of the officials of the Office of Price Administration that the requested relief would be forthcoming within a few hours. Overcharges made pursuant to such advice do not, in our opinion, indicate a willful intent to violate the Act. * * *" (101 Fed. Supp. 877 at 883.)[19]

[19]That Appellee acted upon expectations of an increased ceiling to be issued momentarily, see Williams' letter of December 5, 1942, wherein he stated in part:

> "* * * We were informed that we would not be taking any chances, as, undoubtedly, the new ceiling would be promulgated before the Tuna could arrive." [R. 216.]

Appellee respectfully submits that the instant case is even a stronger one for allowing the deduction, primarily for two reasons: First: the need for the increased ceiling was so obvious and glaring that it was granted, rather than denied by the Office of Price Administration. Secondly: when Appellee invoiced its customers it agreed to refund the $1.00 per case increase to the buyer, if the quoted price was not approved. There is no indication in the opinion that a similar precaution was taken in the *Hershey* case.

Conclusion.

It thus appears that the status of the law is to the effect that if the violation of the OPA law or regulations has not been willful, but rather has been innocently and unintentionally made under circumstances which are inconsistent with an intention to violate the Act, and inconsistent with a lack of due care to conform to the law, the deduction is allowable. The fact that OPA, at the time of the violation, was willing to accept single damages, constitutes positive and compelling evidence that the violation was not willful, but rather was innocently and unintentionally made. In the instant case, the District Court has found that Appellee paid only single damages, and made the alleged overcharges involved innocently, unintentionally, and under circumstances which are inconsistent with an intention to violate the Act and inconsistent with a lack of due care to conform to the law. There is substantial evidence to support these findings and they

are not clearly erroneous. Accordingly, under the law and the facts of this case, the judgment should be affirmed.

Dated November 23, 1955.

Respectfully submitted,

MACKAY, MCGREGOR, REYNOLDS & BENNION,
By A. CALDER MACKAY,
ARTHUR MCGREGOR,
ADAM Y. BENNION,
STAFFORD R. GRADY,
Attorneys for Appellee.

APPENDIX.

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] Expenses.—

(1) Trade or Business Expenses.—

(A) In General.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * * * * *

(26 U. S. C., 1952 Ed., Sec. 23.)